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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Softer Voices)	MUR 5831

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

(1) Take no further action against Softer Voices other than to issue a letter of admonishment; and (2) close the file.

II. BACKGROUND

In 2009, the Commission found reason to believe that Softer Voices had violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee after making expenditures for, and possibly receiving contributions in response to, an advertisement that expressly advocated the defeat of U.S. Senate candidate Robert Casey in the November 7, 2006 general election.¹ See MUR 5831 Factual and Legal Analysis.

The Commission also found reason to believe that Softer Voices violated 2 U.S.C. § 441a(f) by accepting contributions in excess of \$5,000, after it triggered political committee status. *Id.* The Commission authorized an investigation to 1) determine whether Softer Voices had made more than \$1,000 in expenditures or received more than \$1,000 in contributions in connection with the advertisement containing express advocacy; and 2) determine both when Softer Voices incurred an obligation to register and report as, and abide by the contributions limits applicable to, a political committee.

In response to the Commission's findings, Softer Voices, which has ceased operations, did not dispute the conclusion that one of its advertisements contained

¹ This matter includes allegations that previously were part of MUR 5854.

1 express advocacy or that the group had a major purpose consistent with political
2 committee status. _____ We advised
3 Softer Voices that _____
4 _____ an investigation was required to obtain information
5 needed to establish exactly when the group triggered political committee status, so as to
6 establish its reporting obligations _____
7 _____

8 In September 2009, just after we concluded our investigation, the Court of
9 Appeals for the D.C. Circuit's decision in *EMILY's List v. Federal Election Commission*,
10 581 F.3d 1 (D.C. Cir. 2009) and the then-upcoming oral argument before the D.C. Circuit
11 Court of Appeals sitting en banc in *SpeechNow.org v. Federal Election Commission*
12 raised questions about whether Softer Voices was subject to the contribution limits in
13 2 U.S.C. § 441a(f).² In January 2010, this Office informed the Commission that it
14 intended to hold this matter in abeyance pending the outcome of *SpeechNow.org v.*
15 *Federal Election Commission*.

16 On March 26, 2010, the D.C. Circuit in *SpeechNow.org v. Federal Election*
17 *Commission*, 599 F.3d 686 (D.C. Cir. 2010) unanimously struck down the limits on

² The *EMILY's List* decision invalidated the Commission's regulation defining contributions found at 11 C.F.R. § 100.57, which was cited in the Softer Voices Factual and Legal Analysis as an alternative basis for finding that the group had triggered political committee status by accepting \$1,000 in contributions in response to a website solicitation that was linked to the "We the People" ad containing express advocacy. See MUR 5831 Factual and Legal Analysis at 9-10. Since the Commission's finding, the investigation revealed that Softer Voices received no new funds after the date on which the solicitation linked to the "We the People" ad was posted on the publicly available portion of its website. Further, Softer Voices has stipulated that it made \$10,000 in expenditures for express advocacy. Accordingly, our conclusion that Softer Voices triggered political committee status is not changed by the invalidation of 11 C.F.R. § 100.57.

1 contributions by individuals to independent expenditure-only organizations.³ The D.C.
2 Circuit, however, upheld the reporting and registration requirements for political
3 committees.⁴ *Id.* at 698.

4 In light of both the legal developments and the passage of time, _____

5 _____
6 _____ Respondent's counsel advised us that
7 _____

8 _____ it was requesting that the Commission first
9 consider dismissing the remaining violations as a matter of prosecutorial discretion.

10 As discussed below, although Softer Voices violated the Act by failing to register
11 and report as a political committee after posting an ad on its website that contained
12 express advocacy _____ we recommend that the Commission exercise its
13 prosecutorial discretion and take no further action in this matter other than to admonish
14 Softer Voices.

15 **III. FACTS**

16 Softer Voices, which describes itself on its website as a conservative issue
17 advocacy organization, is based in Washington, D.C. It was established on July 15, 2004
18 and files disclosure reports with the Internal Revenue Service under Section 527 of the
19 Internal Revenue Code. 26 U.S.C. § 527. The group was active in 2004 and 2006, and

³ In June 2010, the Department of Justice decided not to file a petition for a writ of certiorari regarding the D.C. Circuit's en banc decision in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010). See Letter from Eric H. Holder, Jr., Attorney General, to The Honorable Harry Reid, Majority Leader, U.S. Senate (June 16, 2010).

⁴ On July 23, 2010, SpeechNow sought to challenge the part of the D.C. Circuit decision that upheld the political committee reporting and registration requirements and filed a petition for a writ of certiorari with the Supreme Court. See *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), petition for cert. filed (U.S. July 23, 2010) (No. 10-___).

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1 filed reports disclosing electioneering communications with the Commission for various
2 advertisements broadcast in 2004 and 2006 general elections.

3 We have no information which suggests that Softer Voices ever made any
4 contributions to a candidate. Although the complaint in this matter alleged that Softer
5 Voices had coordinated certain activity with Rick Santorum's 2006 re-election campaign,
6 the Commission found no reason to believe that there had been any coordinated in-kind
7 contribution. See MUR 5831 Factual and Legal Analysis.

8 Since the 2006 election, Softer Voices has not received any funds, updated its
9 website or made public statements reported in the press, or reported any activity other
10 than administrative costs and the refund of some prior donations. Significantly, Softer
11 Voices has not received any new funds (whether properly characterized as donations or
12 contributions) since October 27, 2006.

13 In reports filed with the IRS, Softer Voices reports spending \$1,266,000 during
14 the 2006 election cycle, with the bulk of this activity (over \$1 million) being for media
15 production or media buys made between September 19 and October 23, 2006. Softer
16 Voices' activities and public statements in 2006 appear to have been directed almost
17 exclusively toward the candidates and issues in the 2006 Senate re-election campaign of
18 Pennsylvania U.S. Senator Rick Santorum. During the 2006 election cycle, Softer Voices
19 filed four electioneering communications reports with the Commission that reflected
20 \$803,149.12 in total disbursements for communications that supported Santorum.

21 The group's website, although not updated since November 2006, remains on the
22 internet, prominently features images of Santorum and shows media player clips of Softer
23 Voices' advertisements, all of which support Santorum's candidacy. The website also

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1 features excerpts of a book written by Rick Santorum and speeches given by him in the
2 Senate. Prominently displayed on the webpage are links to newspaper articles describing
3 Softer Voices, including a link entitled: "Political Group Shells Out \$1M To Boost
4 Santorum's Popularity With Women." The linked article reports that Softer Voices
5 sought to "soften the image of Senator Santorum of Pennsylvania in the hope of boosting
6 his standing with female voters and saving his Senate seat for the Republican Party." See
7 MUR 5854 Complaint, Exhibit F. In the same article, Lina Schiffren, the co-founder of
8 Softer Voices, is quoted as having stated that the group's ads sought to influence voters
9 (e.g., "It's really important for conservatives to remember and *for voters to remember*
10 that welfare reform was a conservative issue and that people like Rick Santorum made it
11 happen ..."). *Id.* (emphasis added).

12 The Commission found reason to believe that Respondent violated the Act by
13 failing to register and report as a political committee after it appeared to have made
14 expenditures in excess of \$1,000 for an ad entitled "We the People" which expressly
15 advocated for the election of Rick Santorum and the defeat of his opponent, Robert
16 Casey, while also having a major purpose of conducting federal campaign activity. See
17 MUR 5831 Factual and Legal Analysis. At the time of the RTB finding, the Commission
18 had no information confirming that the "We the People" ad posted on the website had
19 been broadcast on television. See First General Counsel's Report at 12 n.11.

20 _____
21 _____
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23 _____

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14 _____ Although Softer Voices' records do not reflect the precise production costs for the
15 "We the People" ad, _____
16 _____ Based on the
17 available information, the ad is likely to have cost less than \$10,000.
18 Softer Voices accepted its last \$200,000 in receipts on October 27, 2006. Softer Voices
19 made disbursements of approximately \$77,397 in November and December 2006, all of
20 which seem to be related to obligations it incurred prior to November 3, 2006. With the
21 exception of administrative costs, Softer Voices has been inactive since the 2006 election.
22 Further, we are advised that the group intends to dissolve once this matter is resolved.

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1 **IV. ANALYSIS**

2 A political committee is any committee, club, association, or other group of
3 persons which receives contributions aggregating in excess of \$1,000 during a calendar
4 year or which makes expenditures aggregating in excess of \$1,000 during a calendar
5 year. 2 U.S.C. § 431(4). To address overbreadth concerns, the Supreme Court has held
6 that only organizations whose major purpose is campaign activity can potentially qualify
7 as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976);
8 *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL"). The
9 Commission has long applied the Court's major purpose test in determining whether an
10 organization is a "political committee" under the Act, and it interprets that test as limited
11 to organizations whose major purpose is federal campaign activity. *See* Political
12 Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597,
13 5601 (Feb. 7, 2007). The Act requires all political committees to register with the
14 Commission and file a statement of organization within ten days of becoming a political
15 committee. 2 U.S.C. § 433. The Act further requires each treasurer of a political
16 committee to file periodic reports of the committee's receipts and disbursements with the
17 Commission. *Id.* § 434(a)(1).

18 The Act provides that no person shall make contributions to any other political
19 committee in any calendar year, which in the aggregate, exceeds \$5,000. 2 U.S.C.
20 § 441a(a)(1)(C). The Act further states that no political committee shall knowingly
21 accept any contribution which exceeds the statutory limitations of section 441a. 2 U.S.C.
22 § 441a(f). However, on March 26, 2010, the D.C. Circuit sitting en banc in
23 *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010)

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1 unanimously struck down the limits on contributions by individuals to independent
2 expenditure-only organizations. Relying on the analysis in *Citizens United v. Federal*
3 *Election Commission*, the D.C. Circuit ruled that because independent expenditures do
4 not corrupt or create the appearance of *quid pro quo* corruption, "contributions to groups
5 that make only independent expenditures also cannot corrupt or create the appearance of
6 corruption." *Id.* at 694 (citing *Citizens United v. Federal Election Comm'n*, 130 S. Ct.
7 876 (2010)). The D.C. Circuit, however, upheld the reporting and registration
8 requirements for political committees based on the public's interest "in knowing who is
9 speaking about a candidate and who is funding that speech." *Id.* at 698.

10 Softer Voices is the type of group for which the *SpeechNow* decision directly
11 applies. It appears to engage only in independent activity, makes no direct contributions
12 to candidates, and only accepted funds from natural persons. Therefore, pursuant to
13 *SpeechNow*, whether a political committee or not, the limitations of contributions from
14 individuals set forth in the Act cannot be applied to Softer Voices. Accordingly, the
15 Commission should take no further action on its earlier finding that Softer Voices
16 violated 2 U.S.C. § 441a(f).

17 However, under the current state of the law, Softer Voices was still required to
18 register and report with the Commission once it achieved political committee status.⁵
19 Softer Voices became a political committee when it admittedly made over \$1,000 in
20 expenditures for the "We the People" express advocacy ad

⁵ Although *SpeechNow* has filed a petition for a writ of certiorari asking the Supreme Court to review the part of the D.C. Circuit decision that upheld the political committee reporting and registration requirements, given our ultimate recommendation to take no further action, we do not think it is necessary for the Commission to await the outcome of that process before considering this matter.

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1 _____⁶ Therefore, Softer Voices was required to register with the
2 Commission ten days after it became a political committee, which appears to be
3 November 13, 2006 at the latest, and begin filing disclosure reports for its subsequent
4 receipts and disbursements.⁷

5 Despite the apparent violation by Softer Voices, we do not believe it is in the
6 Commission's interest to further pursue this matter and recommend that the Commission
7 take no further action in connection with Softer Voice's failure to register and report,
8 other than to send a letter of admonishment. This recommendation is based on the unique
9 combination of factual circumstances discussed below.

10 The "We the People" website ad _____ was
11 the group's only express advocacy during the two election cycles in which it existed. The
12 amount of the disbursement for "We the People" was relatively small in both absolute
13 terms (less than \$10,000) and as a part of the group's 2006 activity (less than 1%). Given
14 the date of the express advocacy, the group was only required to register and begin
15 reporting after the November 2006 election, which also was the last election in which it
16 was active. Further, because Softer Voices had no receipts after October 27, 2006, the
17 disclosure reports that Softer Voices should have filed would not have included any

⁶ Softer Voices also would have become a political committee upon receipt of \$1,000 in contributions made for the purpose of influencing a federal election. See 2 U.S.C. § 431(8)(A)(i). For example, if the donors who gave Softer Voices \$200,000 on October 27, 2006 did so for the purpose of funding ads containing express advocacy, those funds would be contributions under the Act. We do not, however, have any evidence that the donors were aware of the single Softer Voices ad containing express advocacy _____

7 _____

_____ We believe that this approach is appropriate under these circumstances, where it appears that Softer Voices did not intend for the vendor to include express advocacy in any of its communications when it incurred the obligation to pay for the ad.

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1 contributions. While Softer Voices made disbursements after it triggered political
2 committee status, these disbursements appear to be related to obligations it incurred prior
3 to achieving political committee status or to administrative expenses.

4 Additionally, because Softer Voices filed disclosure reports with the IRS, it
5 eventually provided relevant information for the public record. Because Softer Voices
6 did not trigger political committee status until a few days prior to the election and was not
7 obligated to register and report as a political committee until after the election,
8 Respondent's post-election filings with the IRS fulfilled the interests of disclosure in
9 nearly the same manner as would have been required of them under Sections 433 and 434
10 of the Act.

11 Further, Softer Voices apparently went to considerable lengths to avoid triggering
12 political committee status in connection with the broadcast advertisements that account
13 for virtually all of its 2006 activity. _____

14 _____
15 _____ It is unclear why the "We the People" ad was ultimately disseminated despite
16 its inclusion of express advocacy, but based on the history of the group's activities and
17 other communications, as discussed above, it appears that this could well have been
18 inadvertent.

19 Following the elections on November 7, 2006, Softer Voices ceased active
20 operations and reported only limited receipts and disbursements related to various legal,
21 banking, and accounting fees. Respondent has had no receipts and only limited
22 disbursements for administrative expenses since the 2006 election. Respondent's most
23 recent available tax return indicated remaining net assets at year-end of \$124,527. See

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1 2008 tax returns on IRS website. Softer Voices' 2009 mid-year and year-end reports, and
2 2010 first quarter reports reflect expenditures totaled \$17,034 for legal, accounting, and
3 bank fees in 2009, an \$80,000 refund to an individual contributor, and \$2,449 in
4 accounting, banking, legal, and post office box fees in 2010. This would leave the group
5 with remaining assets of approximately \$25,000. The group did not file any
6 electioneering communications reports during the 2008 election cycle and none thus far
7 for the 2010 election cycle. Respondent's counsel has represented to the Office that
8 Softer Voices plans to dissolve upon resolution of this matter.

9 While none of the factors discussed above would individually support a decision
10 to take no further action, the combination of these factors, including the relatively small
11 amount involved, the short period in which the group remained active after qualifying as
12 a political committee, and the mitigating effect of the reporting to the IRS, all lead us to
13 conclude that the Commission should exercise its prosecutorial discretion in this matter.
14 Therefore, in light of the particular circumstances in this matter, we recommend that the
15 Commission take no further action against Softer Voices, other than to issue a letter of
16 admonishment, and close the file.

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V. RECOMMENDATIONS

1. Take no further action against Softer Voices other than to issue a letter of admonishment;
2. Approve the appropriate letter; and
3. Close the file.

Date

7/27/2010

Thomasenia P. Duncan
General Counsel

Kathleen Guith
Acting Associate General Counsel
for Enforcement

Mark Shonkwiler
Assistant General Counsel for Enforcement

Phillip A. Olaya
Attorney

Attachment – Softer Voices May 7, 2009 Submission

Form

8872

(November 2002)

Department of the Treasury
Internal Revenue Service**Political Organization
Report of Contributions and Expenditures**

OMB No. 1545-1896

► See separate instructions.

A For the period beginning 10/27/2006

and ending 12/16/2006

B Check applicable box: ☒ Initial report ☐ Change of address ☐ Amended report ☐ Final report**1** Name of organization

Softer Voices

Employer identification number

20 - 1369251

2 Mailing address (P.O. box or number, street, and room or suite number)

PO Box 3588

City or town, state, and ZIP code

Washington, DC 20027 - 0088

3 E-mail address of organization:

info@softervoices.org

4 Date organization was formed:

07/15/2004

5a Name of custodian of records

Cynthia Young-Palmer

5b Custodian's address

PO Box 3588

Washington, DC 20027 - 0088

6a Name of contact person

Lisa Schiffman

6b Contact person's address

PO Box 3588

Washington, DC 20027 - 0088

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number

PO Box 3588

City or town, state, and ZIP code

Washington, DC 20027 - 0088

8 Type of report (check only one box)☐ First quarterly report
(due by April 15)☐ Second quarterly report
(due by July 15)☐ Third quarterly report
(due by October 15)☐ Year-end report
(due by January 31)☐ Mid-year report (Mid-election
year only due by July 31)☐ Monthly report for the month of:(due by the 20th day following the month shown above, except the
December report, which is due by January 31)☐ Pre-election report (due by the 12th or 15th day before the election)

(1) Type of election:

(2) Date of election:

(3) For the state of:

☒ Post-general election report (due by the 30th day after general election)

(1) Date of election: 11/07/2006

(2) For the state of: DC

9 Total amount of reported contributions (total from all attached Schedules A).....9. \$ 200000**10** Total amount of reported expenditures (total from all attached Schedules B).....10. \$ 63796

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Clea Mitchell

12/07/2006

**Sign
Here**

Signature of authorized official

Date

Schedule A	Schedule A
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Itemized Contributions**Contributor's name, mailing address and ZIP code**

Carl Lindner
8555 Shawnee Run Road
Cincinnati, OH 45243

Name of contributor's employer

American Financial Group

Contributor's occupation

Chief Executive Officer

Aggregate contributions year-to-date

\$ 250000

Amount of contribution

\$ 100000

Date of contribution

10/27/2006

Contributor's name, mailing address and ZIP code

Jack Templeton, MD
601 Pensbrooke Road
Bryn Mawr, PA 19010

Name of contributor's employer

John Templeton Foundation

Contributor's occupation

President/Physician

Aggregate contributions year-to-date

\$ 630000

Amount of contribution

\$ 100000

Date of contribution

10/27/2006

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Schedule E Itemized Expenditures**Schedule B**

Recipient's name, mailing address and ZIP code Heather Higgins P.O. Box 3588 Washington, DC 20027	Name of recipient's employer The Randolph Foundation Recipient's occupation President	Amount of Expenditure \$ 362 Date of expenditure 11/30/2006
Purpose of expenditure Expense Reimbursement for Better Voices Website		
Recipient's name, mailing address and ZIP code Itkon Holdings, Inc. 1101 30th Street, NW, Ste 220 Washington, DC 20007	Name of recipient's employer n/a Recipient's occupation n/a	Amount of Expenditure \$ 10000 Date of expenditure 11/30/2006
Purpose of expenditure Consulting Fees		
Recipient's name, mailing address and ZIP code Alfano Leonardo 1090 Vermont Avenue Washington, DC 20005	Name of recipient's employer n/a Recipient's occupation n/a	Amount of Expenditure \$ 10000 Date of expenditure 11/30/2006
Purpose of expenditure Media Production		
Recipient's name, mailing address and ZIP code Alfano Leonardo 1090 Vermont Avenue Washington, DC 20005	Name of recipient's employer NA Recipient's occupation NA	Amount of Expenditure \$ 8761 Date of expenditure 11/01/2006
Purpose of expenditure Media Production		
Recipient's name, mailing address and ZIP code Lisa Webb 5822 Longwood Drive, #283 Myrtle Beach, SC 29576	Name of recipient's employer NA Recipient's occupation Website Developer	Amount of Expenditure \$ 1425 Date of expenditure 11/13/2006
Purpose of expenditure Website Development		
Recipient's name, mailing address and ZIP code Itkon Holdings, Inc. 1101 30th Street, NW, Ste 220 Washington, DC 20007	Name of recipient's employer NA Recipient's occupation NA	Amount of Expenditure \$ 19300 Date of expenditure 11/03/2006
Purpose of expenditure Media Production		
Recipient's name, mailing address and ZIP code Foley & Lardner LLP 3000 K Street, NW Washington, DC 20007	Name of recipient's employer NA Recipient's occupation NA	Amount of Expenditure \$ 15748 Date of expenditure 11/14/2006
Purpose of expenditure Legal fees		

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Form 8872
(November 2002)

Department of the Treasury
Internal Revenue Service

Political Organization Report of Contributions and Expenditures

OMB No. 1545-1688

► See separate instructions.

A For the period beginning 12/01/2006 and ending 12/31/2006

B Check applicable box: ☒ Initial report ☐ Change of address ☐ Amended report ☐ Final report

1 Name of organization
Softer Voices

Employer identification number
20-1349251

2 Mailing address (P.O. box or number, street, and room or suite number)
PO Box 3588

City or town, state, and ZIP code
Washington, DC 20027 - 0088

3 E-mail address of organization:
info@softervoices.org

4 Date organization was formed:
07/15/2004

5a Name of custodian of records
Cynthia Young-Palmer

5b Custodian's address
PO Box 3588
Washington, DC 20027 - 0088

6a Name of contact person
Lisa Schiffman

6b Contact person's address
PO Box 3588
Washington, DC 20027 - 0088

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number
PO Box 3588

City or town, state, and ZIP code
Washington, DC 20027 - 0088

8 Type of report (check only one box)

- ☐ First quarterly report
(due by April 15)
- ☐ Second quarterly report
(due by July 15)
- ☐ Third quarterly report
(due by October 15)
- ☒ Year-end report
(due by January 31)
- ☐ Mid-year report (in-between election
year only due by July 31)

- ☐ Monthly report for the month of:
(due by the 20th day following the month shown above, except the
December report, which is due by January 31)
- ☐ Pre-election report (due by the 12th or 15th day before the election)
(1) Type of election:
(2) Date of election:
(3) For the state of:
- ☐ Post-general election report (due by the 30th day after general elections)
(1) Date of election:
(2) For the state of:

9 Total amount of reported contributions (total from all attached Schedules A).....9. \$ 0

10 Total amount of reported expenditures (total from all attached Schedules B).....10. \$ 20362

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Cleta Mitchell

01/31/2007

Sign
Here

Signature of authorized official

Date

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Schedule B Itemized Expenditures**Schedule B****Recipient's name, mailing address and ZIP code**

Heather Higgins
P.O. Box 3588
Washington, DC 20007

Name of recipient's employer

The Randolph Foundation
Recipient's occupation
President

Amount of Expenditure

\$ 362
Date of expenditure
12/18/2006

Purpose of expenditure
Expense Reimbursement**Recipient's name, mailing address and ZIP code**

Alfano Leonardo
1890 Vermont Avenue
Washington, DC 20005

Name of recipient's employer

n/a
Recipient's occupation
n/a

Amount of Expenditure

\$ 10000
Date of expenditure
12/04/2006

Purpose of expenditure
Media Production**Recipient's name, mailing address and ZIP code**

Ilkon Holdings
1101 30th Street, NW, Ste 220
Washington, DC 20007

Name of recipient's employer

n/a
Recipient's occupation
n/a

Amount of Expenditure

\$ 10000
Date of expenditure
12/15/2006

Purpose of expenditure
Consulting Fees